86-1447

NO._____

Supreme Court of the United States

_____Term, 1987

Raymond R. Torres, Petitioner

vs.

Secretary of the Navy, Respondent

Petition for a Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Raymond R. Torres
In Propria Persona
10910 Glencreek Circle
San Diego, CA 92131-2526
(619) 549-3445; 437-6160

Date: February 20, 1987

QUESTIONS PRESENTED

I. Is a Federal Employee required to prove racial motivation in a Title VII discrimination case relative to Section 704(a), 42 U.S.C. 2000e-3(a), in the Petitioner's allegations of reprisal (restraint and interference), and retaliation, for having filed charges of discrimination.

II. Does affirmative action (and federal agency affirmative action plans AAPs) require more than a passive response by an agency when considering a group of "best qualified" employees for promotion (including minorities), on a merit promotion certificate, where six applicants have been rated substantially equal in qualifications (i.e., "best qualified" of all the "highly qualified" applicants), and where the agency AAP calls for a results-oriented change in the personnel management statistics of

the agency.

III. Does Title VII legal analysis in the adjudication of charges of discrimination filed by Federal Employees negate the lawful and regulatory protections and rights of such government employees unless discriminatory motivation under Title VII is linked to the violation of such legal and regulatory rights and protections or should such a pattern of regulatory infractions act as circumstantial indicia in establishing a prima facie case of discrimination.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Raymond R. Torres, the Petitioner, in propria persona, herein prays that a Writ of Certiorari issue to review the memorandum disposition of the Ninth Circuit Court of Appeals in Raymond R. Torres, Petitioner v. Secretary of Navy, Appellee - Defendant, dated November 24, 1986; rehearing en banc denied.

OPINIONS BELOW

1. The Findings of Fact and Conclusions of Law and Order Granting Motion To Dismiss Pursuant to Rule 41 (b), Fed. R.Civ.P. were filed and entered by the Trial Court on November 16, 1984 and is reprinted at pages 2A-35A of the Appendix (hereinafter "App").

2. A separate judgment for costs was entered on January 30, 1985, by the District Court and is reprinted at App. A36-A37.

3. The memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit, dated November 24, 1986, and is reprinted at App. A38-A42.

4. The Order of the U.S. Court of Appeals for the Ninth Circuit dated January 14, 1987, and is reprinted at App. A43.; rehearing En Banc denied.

JURISDICTION

The memorandum of the United States Court of Appeals for the Ninth Circuit was filed on November 24, 1986. The jurisdiction of this Court is invoked pursuant to Section 28 U.S.C. Section 1254.

STATUTORY PROVISIONS INVOLVED

Section 704 (a) of Title VII, 42 U.S.C. 2000e-3(a), as amended, provides in part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because (the employee) has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Section 42 U.S.C. 2000e-5(g) empowers a district court to order race-conscious relief that may benefit individuals who are not identified victims of unlawful discrimination Sheet Metal Workers v. EEOC, 46 CCH, S.CT. Bull. P., B4442.

Section 12 Veterans Preference Act of 1944: states Reduction in Force and Reduction in Rank of Veteran requires "due process."

Executive Order 11478 Sec. 4 states: "The Civil Service Commission shall provide for the prompt, fair, and

impartial consideration of all complaints of discrimination...and shall encourage the resolution of employee problems on an informal basis."

STATEMENT OF THE CASE

Petitioner filed a timely appeal of the Trial Court's Finding of Fact and Judgment (App. A2) to his original complaint filed April 19, 1978, consolidated with a later complaint on April 14, 1982. The two actions were brought to trial in July - August 1984. The consolidated complaint contained allegations of discrimination, retaliation, and reprisal (restraint and interference) with reference to the following causes of action:

a. Nonselection for a position as Civilian Personnel Director, (GS-13) (hereinafter "CPD") Rota, Spain.

b. Removal via reduction-in-force (RIF) procedure from a Civilian Personnel Officer (GS-12) (hereinafter "CPO") position at Miramar Naval Air Station (NAS), San Diego, CA, partly because of the Petitioner's failure to accede to the

Commanding Officer's pressure to discharge another Hispanic employee who was responsible for the command equal employment opportunity (hereinafter "EEO") program owing to the Commanding Officer's disgruntlement with EEO.

c. Withdrawal of tentative selection for a Civilian Personnel Officer (GS-12) position in Iwakuni, Marine Corps Air Station (MCAS), Japan.

d. Discharge from employment as a Position Classification Specialist (GS-12) from the Civilian Personnel Department, Naval Air Station (NAS), North Island, San Diego, CA.

The Trial Court granted Defendant's Motion for Summary Judgment enunciating conclusions of fact and law (App. A2).

The factual allegations of the Petitioner's consolidated complaint establish that the Respondent engaged in

improper personnel actions which removed Petitioner from lawfully tenured positions without the benefit of "due process" required in accordance with established regulations (Navy and Federal Personnel Manual) while engaging in overt and covert discriminatory treatment of the Petitioner. For example:

a. The Respondent, admittedly made allegations of inefficiency and misconduct against the Petitioner while removing him from a Civilian Personnel Officer position (NAS Miramar), in the knowledge that FPM Supp. 752-1, Sec. S1-3a(6) prohibited the use of RIF (FPM 351) procedures in such removal. (Fitzgerald v. Hampton, 467 F.2d 755; Losure v. ICC, U.S. MSPB, Docket No. 35199008; Ritter v. Strauss; 261 F.2d 767.

b. The Respondent canceled the Petitioner's selection for the Iwakuni, Japan, position based upon the circum-

stances surrounding his removal from the NAS Miramar position without benefit of having followed FPM Part 752 procedures. As a consequence, Petitioner could not defend against timely, specific and detailed charges. In being removed from the NAS Miramar position (via RIF), the Petitioner was not granted RIF rights to another comparable position. For example, in Iwakuni, as is required by the following.

FPM 351-39, Subchapter 10-1 states:

> An agency does not wait for an employee's separation before entering him on the list but enters him as soon as it knows it cannot retain him in his competitive area.

FPM 335:

> When an employee or former employee has a rightful claim to a position change, reemployment, or restoration, the appointing officer is responsible for determining that those rights have been observed before adopting other means of filling a competitive position."

c. The Petitioner was then discharged from employment for having

pursued his complaints of discrimination, and in alleging reprisal activity (restraint and interference) against Respondent in the processing of the Petitioner's complaints. Fabricated charges were lodged against Petitioner in order to effect his discharge which were not found to be credible by a full evidentiary administrative hearing conducted by the MSPB (San Francisco) and in a full secondary review by the MSPB (Washington D.C.). Some of the charges contained in Respondents proposed letter of removal of November 2, 1979, were directly related to the Petitioners' previous charges of reprisal (i.e., 29 CFR 1613. 262(b)). Each and every charge and specification lodged against the Petitioner was reversed. The official proposing the discharge of Petitioner testified in the MSPB hearing that he was, in part, motivated by the fact that

the Petitioner, et al, had filed a "...spate of complaints of discrimination and reprisal." (Opening Brief for Appellant at 17).

In granting summary judgment to Respondent, the Trial Court authorized court costs based, in part, on the fact that the Petitioner had gone so far as to name the Secretary of the Navy (SECNAV) as an alleged Discriminating Official (ADO). The SECNAV had been named by the Petitioner because the selection of the Navy's civilian personnel directors was controlled by the Office of the Secretary of the Navy. The Trial Court feared that the mitigation of costs might cause a "...tidal wave of similar suits by other people who want to take a shot at the government..." The effect of this Trial Court opinion conditioned its decision in the matter of costs, and by extension explained the bent of mind of

the Trial Court during the trial affecting its decision for summary judgment.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW LEAVES PRECEDENT IN SUPPORT OF THE ERRONEOUS PRINCIPLE THAT THE ACT OF RETALIATION IN TITLE VII, SECTION 704(a) CASES, REQUIRES A RACIAL MOTIVATION OTHER THAN THE NATIONAL ORIGIN OF THE PETITIONER IN HAVING FILED A DISCRIMINATION COMPLAINT.

The facts of this case do not comport with the findings of the Trial Court (App. A2). Section 704(a) unequivocally prohibits discrimination against a specific type of person regardless of race. That is:

> (1) because he has opposed any practice made an unlawful employment practice by this title (the 'opposition' clause); or
>
> (2) because he has made a charge, testified, assisted, or participated in any manner in an investigation,

> proceeding, or hearing under this title (the 'participation' clause).

and

> The law is relatively clear with respect to the participation clause, which provides 'exceptionally broad protection'[3]
> Pettway v. American Cast Iron Pipe Co., 411 F.2d 998,1106 n. 18, 1 Fed 752,757.

See Employment Discrimination Law, Schlei Grossman, copyright 1976 BNA Washington, D.C., page 417 which states, in part, as follows:

> In order to establish a violation of Section 704(a), be it the opposition or participation clause, the plaintiff must establish, first, the basis, which is to say that there was statutorily protected participation or opposition; second the issue, an adverse employment action, such as discharge or other forms of discrimination; and, finally, a causal connection between the participation/opposition (basis) and the adverse employment action.

Inasmuch as the Trial Court granted summary judgment for the Defendant it did not fully delve into the pretextual aspects of the retaliation issue and thus was not able to respond to the broader

purpose of Section 704 (a) which is to keep open channels for social change, not just lay out a cause of action between the Petitioner and his employer.

In Gunther v. County of Washington, 602 F.2d, 882, 892 (9th Cir. 1979) "linkages" (App. A41) means either direct or circumstantial evidence, such as defendant's knowing of plaintiff's opposition to the allegedly unlawful practices before an adverse action. The courts below accepted the Defendant's "articulation of a legitimate non-discriminatory reason" for its management decisions challenged by the Petitioner yet in granting summary judgment and dismissal of the Petitioner's cases it did not grant the Petitioner his right to question, in detail the "legitimacy" of the Defendant's actions which Petitioner deemed improper and as indicia to the retaliatory actions taken against him

including discharge. The Petitioner should not be enjoined from defending himself from the Defendant's axiomatically induced retaliation (because he filed complaints of discrimination) under the cloud of Title VII analysis by the Courts below which indicate that he did something wrong in naming officials of the Navy as alleged discriminating officials (ADO's) and which required him to establish a "linkage" of the Petitioner's charges of retaliation to a basis of intentional "racial" motivation. This requirement appears to present a higher standard of proof than the "preponderance of the evidence" standard which applies in Title VII cases. Mead v. U.S. Fidelity and Guaranty Co., 442 F. Supp. 114 (1977). In granting summary dismissal the lower courts denied the Petitioner the full opportunity to demonstrate by

evidence that the reasons assigned by the Defendant for the adverse actions taken were pretextual. Hockstadt v. Worchester Foundation, 545 F.2d 222 (1st Cir. 1976); accord, EEOC v. Kallir, Phillips, Ross, Inc., 401 F. Supp. 66. In their decisions in granting summary judgment and dismissal the lower courts also failed to take into account that "a defendant's discriminatory conduct and intent may also be inferred from circumstantial evidence." Mead, supra, at p. 131.

The failure of the Trial Court, and the Ninth Circuit's decisions, and the relative absence of specific Supreme Court precedent regarding the concept of retaliation against Plaintiff by Defendant raises significant questions of law concerning the protections to be accorded Title VII plaintiffs under Section 704(a) relative to the standards

of proof required in proving such cases. Although there exists other ample Appellate Court precedent regarding the broad protection against retaliation the Trial Court's decision and the Ninth Circuit Court's affirmation of that decision seem to go against Congress' intent that persons who file discrimination charges are to be fully protected from any retaliation, both to secure the rights of the charging party and to avoid chilling the actions of others who might sue to implement the guarantees of Section 704(a) and Title VII, Mead, supra at 132. The Ninth Circuit Court's affirmation of the Trial Court's summary judgment and dismissal of the Petitioner's cases seem to be in opposition to these Appellate Court decisions, including the Ninth Circuit's own decisions, e.g., Gunther, supra, and most recently, in Garcia v. Lawn, 86 Daily

Journal D.A.R. 4099, Dec. 31, 1986 _____ F. 2d_____, citing Holt v. Continental Group Inc. 798 F. 2d 87, 91 (2d Cir. 1983) in the proposition that the district court is required to consider the effects of retaliatory conduct on the exercise of Title VII rights of other employees.

The Petitioner respectfully urges no firmer "causal link" to the Petitioner's discrimination complaints than respondent's charges and specifications, as contained in his removal letter, can be found, therefore, this Court should grant this Petition for a Writ of Certiorari in order to clarify for the lower courts the kinds of protections that are inherent in Section 704(a), and specifically, whether or not "racial motivation" is a requirement as a standard of proof in charges of retaliation.

II. THE NINTH CIRCUIT COURT'S AFFIRMA-

TION OF THE TRIAL COURT'S DECISION ON AFFIRMATIVE ACTION IGNORES ITS OWN RECENT FINDING WITH REFERENCE TO THE ACCORDING OF PREFERENTIAL TREATMENT TO MINORITIES AND WOMEN IN AFFIRMATIVE ACTION CASES.

The Trial Court specified in its order granting Respondent's motion to dismiss that 42 U.S.C., Sec. 2000e-16(a) "... does not require that preferential treatment be afforded to any employer based upon his or her minority status even though such action may be permitted under a policy of affirmative action, under certain limited circumstances," and cited Steelworkers v. Weber, 443 U.S. 193, 205-206, (1979); Firefighters Local Union No. 1784 v. Stotts, ___ U.S. ___ 104 S. Ct. 2576 (1974) and Page v. Bolger, 645 F.2d 227, 232-34 and n. 10 (4th Cir. 1981) (en banc), cert denied, 454 U.S. 892 (1981), (App. A30), as authority for its finding. The Ninth

Circuit Court affirmed such findings.

Affirmative action has been addressed, as correctly stated by Respondents in Steelworkers, Stotts, and Page, supra. However, in a recent case before this Court, i.e., Johnson v. Transportation-Agency, Santa Clara County, California 748 F.2d 1308 (9th Cir. 1984) (hereinafter "Johnson"), the Ninth Circuit followed the precepts of Executive Order 11478, and Local Number 93, International Association of Firefighters AFL-CIO C.L.C. v. City of Cleveland, et al., 46 CCA S. Ct. Bull., P. B4521 (hereinafter "Firefighters") and Local 28 of the Sheet Metal Workers International Association, et al., v. Equal Employment Opportunity Commission et al., 46 CCH S. Ct. Bull, P. B4451 (hereinafter "Sheet Metal Workers") in clarifying the concept of affirmative action in holding that an affirmative

action plan is permissible when 1) it is designed to break down old patterns of racial segregation; 2) it does not create an absolute bar to the advancement of white employees, 3) it does not unnecessarily trammel the interests of white employees; and 4) it is a temporary measure "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." Johnson at 1311. Johnson also appears to correctly state the affirmative aspects of AAP's in stating that an employer need not show its own history of purposeful discrimination, Johnson, 770 F.2d at 758; that, it is sufficient for an employee to show a conspicuous imbalance in its work force, Setser v. Novak Investment Co., 657 F.2d at 962 (8th Cir.) (en banc), cert. denied, 454 U.S. 1064, 102 S. Ct., 615, 70 L. Ed. 2d 601 (1981), that voluntary affirmative action is a reasonable

response to an "arguable violation" of Title VII, Weber supra, at 211; that, the import of any lawful AAP is to give preference to members of underrepresented groups, Johnson supra, at 1314, and, finally, the mere existence of an opportunity for members of (discriminated) groups to apply for jobs will, not by itself result in timely attainment of parity for currently underrepresented groups, Johnson, supra at 1314. This Court stated in Firefighters, at B4551 supra, as follows:

> The Court leaves open the question whether the race-conscious measures provided for in the consent decree at issue here were permissible under Sec. 703

This Court may clarify the issue stated above with regard to Sec. 703 affirmative action, in the near future, in its forthcoming decision re Johnson. The relevant statistics of an employer, which, of necessity, are crucial to the affirmative

action case such as in Johnson, and in the instant case, should require only an "arguable violation" of Title VII. Weber, supra, at 211. The Trial Court below demanded more than an "arguable violation" citing Page, supra, by discrediting Petitioner's statistics which are derived from official reports of the Respondent, and, from oversight, agencies of the Federal Government. This Court also addressed this matter in Sheet Metal Workers, supra, at B4483, in stating:

> The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future.

The Petitioner respectfully asserts herein that the lower courts findings do not comport with recent Supreme Court, and other Ninth Circuit Court decisions, re affirmative action, but rather retard

the implementation of congressional intent and EO 11478 affirmative action. Sheet Metal Workers supra, at B4463. As stated in Sheet Metal Workers, at B4490, in response to the solicitor-general's arguments against affirmative action

> We decline petitioners' invitation to read Stotts to prohibit a court from ordering any kind of race-conscious affirmative relief that might benefit nonvictims.

The Petitioner respectfully suggests that although his is not a Sec. 706(g) case, and even though he was not selected (on repeated occasions) for more responsible positions by his employer, and the Respondent admits that affirmative action was specifically not considered in the Petitioner's non-selection for the CPD, Rota, Spain, position (in 1976), the Respondent was obligated under his own AAP to not only consider affirmative action, but to attempt to eliminate a manifest racial imbalance (Johnson,

supra, at 1311). The instant case, herein, is juxtaposed to the other cited cases, and to Johnson, supra, in that Johnson was voluntarily selected for a higher level position in conformance to the employer's AAP (even though she was admittedly less qualified than the employee who was not selected). As a consequence, the question posed here is whether the employer had (or has) an affirmative requirement to follow its own AAP in response to an "arguable violation" or is the employer entitled to "admittedly" ignore its own AAP, Page, supra, notwithstanding.

The Petitioner believes the Petition for the Writ of Certiorari should be issued based upon the unanswered questions above, and because of concurring opinion in Firefighters, supra, at B4521, and the closeness of the legal questions posed relative to

Johnson, supra.

III. CLARIFICATION IS REQUIRED CONCERNING VIOLATIONS OF EMPLOYER REGULATIONS IN CARRYING OUT ACTS OF DISCRIMINATION AND RETALIATION BASED UPON AN AUTOMATIC RETALIATORY RESPONSE TO EMPLOYEE CHARGES OF DISCRIMINATION AGAINST THE EMPLOYER AS RELEVANT INDICIA TO A CIRCUMSTANTIAL, PRIMA FACIE CASE ELSE SUCH EMPLOYER VIOLATIONS IF CARRIED OUT WITH IMPUNITY IN TITLE VII CASES CAUSE A GENERAL STATE OF ILLEGALITY AND DISORDER IN THE GOVERNMENTAL BODY POLITIC.

Petitioner respectfully submits that Certiorari review by this Court on this matter is necessary insofar as the Trial Court did not address any of Petitioners allegations of statutory and regulatory violations which were offered as relevant indicia to the establishment of a prima facie case of discrimination/ retaliation. Nor did the Ninth Circuit Court

address this vital issue. The Statement of the Case, supra, outlines several allegations of regulatory and statutory violations which adversely affected the Petitioner yet only a general and conclusory opinion by the lower court, was rendered in a finding of "no discrimination." The consequences of a federal employers' refusal to acknowledge the requirements of the Office of Personnel Management (OPM) regulations, insofar as they relate to an employee's allegations of discrimination/retaliation should not be condoned.

FPM supplement 752-1, states, at paragraph 4a(3) at p. 12, in part, as follows:

> Finally, agencies should remember that they must satisfy any of their own regulatory requirements which may go beyond those in Part 752. In the case of Watson v. U.S., the Court of Claims held that the procedural regulations of an agency issued under statutory authority have the force and effect of law and must be complied with by the agency

that issued them.

In accord, Service v. Dulles, 354 U.S., 363,372; Vitarelli v. Seaton 359 U.S. 535.

As recognized and admitted by the Trial Court there was undue delay in the processing of the Petitioner's complaints of discrimination under the procedures outlined in 29 CFR 1613.211 through 29 CFR 1613.222 (the "extended" procedure), and in 29 CFR 1613.261 and 262(b) (the "expedited procedure" in reprisal charges). The delay in processing of complaints allows employers time to engage in, if not intentional "restraint and interference," then unintentional delay thus tainting the discrimination complaint process allowing for unwarranted employer disciplinary or other adverse personnel actions. One need only review the charges and specifications in the proposed letter of removal

issued to the Petitioner to see the "linkage" to his "constructive discharge" from his position as CPO, NAS Miramar in March 1977. That is, employer charges of removal relate specifically to the Petitioner's charges of discrimination/ reprisal. Yet, the Trial Court, and the Ninth Circuit Court failed to see any "linkage." The Trial Court acknowledged in its decision from the bench it was "perplexed" by the fact that the employer, et al., took many times over the usual or recommended time periods to handle the Petitioner's complaints. Nevertheless in its order granting motion to dismiss the Trial Court finds no "linkage" between the adverse actions taken against the petitioner relative to his filing of prior EEO complaints (App. at A41). The Trial Court, in its order, was moot on the subject of the more subtle forms of "restraint and

interference" (29 CFR 1613.262(b)) charges lodged by the Petitioner.

The Petitioner respectfully contends that by upholding the Trial Court's order, the Ninth Circuit Court of Appeals has acquiesced to the employer's overt and covert forms of discrimination/ reprisal which include regulatory violations which are subsumed in Title VII analysis conducted by the employer (and oversight officials of agencies and the EEOC). The Ninth Circuit's holding permits employer conduct which is tantamount to circumvention of the laws, rules, and regulations affecting all employees of the employer. Discrimination complaints should be processed in an atmosphere of full and free disclosure and without restraint, Shipp v. Walker 13 FEP Cases 163, 166, U.S.D., C.D.C. 1975; In Re Charge to Grand Jury, Fed. Rep. Vol. 62, at 831.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Raymond R. Torres, In Propria Persona

Dated: 20 February 1987

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND R. TORRES, Plaintiff,)
)
vs.)
)
SECRETARY OF THE NAVY, Defendant)
)

NO. 78-Ø256-B (I)
82-Ø294-B (I)

[CONSOLIDATED]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS, PURSUANT TO RULE 41(b), FED. R. CIV. P.

Trial of the above-entitled consolidated actions commenced on July 3, 1984, before the court, sitting without a jury, and proceeded through approximately twenty-three and one-half (23 1/2) trial days before plaintiff rested his case, on

August 29, 1984. Plaintiff, Raymond R. Torres, was represented throughout the trial by attorneys Robert W. Rutherford and Lawrence E. Phillips, and the defendant Secretary of the Navy was represented by Stephen V. Petix, Assistant United States Attorney.

On August 29, 1984, at the close of plaintiff's case, the defendant moved for dismissal of the plaintiff's consolidated actions and all of the causes of action included therein under Rule 41(b) of the Federal Rules of Civil Procedure, which provides in pertinent part, as follows:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the vent the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the

> plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The Court has attempted to weigh the evidence and resolve any conflicts, in accordance with its role under the law as the fact finder. Wilson v. United States, 645 F.2d 728, 730 (9th Cir. 1981). Pursuant to Rule 52(a), Fed. R. Civ.P., and limiting its consideration to that evidence presented in the plaintiff's case-in-chief, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The consolidated actions before the court allege unlawful discrimination in federal employment, and related retaliatory conduct, all prohibited by

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. S 2000e-16, which provides, in pertinent part, as follows:

> (a) All personnel actions affecting employees . . . in military departments . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

2. The plaintiff, Raymond R. Torres, is an individual of Hispanic national origin, namely, "Spanish-Mexican-American," as alleged in his complaints.

3. At all times pertinent to this case, plaintiff was a civilian employee of the Department of the Navy, entitled to the protections of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. S 2000e-16.

4. The court is asked to grant judgment of dismissal of plaintiff's case, which the defendant characterizes as four (4) discrete instances of alleged

discrimination or reprisal. they include: (1) the nonselection of plaintiff for the Civilian Personnel Director (GS-13) position at Naval Station, Rota, Spain, in June of 1976; (2) the transfer of the personnel servicing function from Naval Air Station (NAS) Miramar to NAS North Island, in the spring of 1977, in which the plaintiff's position as Civilian Personnel Officer at Miramar was abolished, and he was transferred to a different position at the same grade level (GS-12) at North Island; (3) the withdrawal of plaintiff's tentative selection to the Civilian Personnel Director (CPD) position (GS-12), at Marine Corps Air STation (MCAS) Iwakuni, Japan in the spring of 1977; and (4) the plaintiff's removal from federal employment at NAS North Island, in January of 1980.

NON-SELECTION FOR THE ROTA, SPAIN CPD POSITION

5. From the evidence presented in the plaintiff's case, Mr. Torres made a timely application for the CPD position at Rota, Spain, and was considered in a field of approximately 85 applicants, out of whom it was determined over 60 were basically qualified. That group was evaluated by a rating and ranking panel that was established under procedures authorized by the Navy's Office of Civilian Manpower Management (OCMM).

6. As a result of that rating and ranking panel procedure, the plaintiff was determined to be among the six "best qualified" candidates. This meant that the plaintiff's name was placed in alphabetical order on a list with that of the other five (5) "best qualified" candidates, and this list was sent to the "selecting official," the "Commanding Officer of Naval Station, Rota, Spain,

along with the application files of all six (6) candidates.

7. The Commanding Officer at Rota, Spain, personally reviewed the file jackets of all six of the "best qualified' candidates submitted to him for consideration. In addition, said selecting official sought the advice of a locally constituted advisory selection panel, which recommended to him Mr. William Wardlow, one of the other five finalists on the "best qualified" list. Based upon that recommendation, plus his own personal evaluation of the applications submitted by all of the six finalists, the Commanding Officer at Rota selected Mr. Wardlow for the CPD position.

8. Although the plaintiff was ranked in the "best qualified' group, along with the other five finalists, there was nevertheless a shade of

difference in qualifications between the plaintiff and Mr. Wardlow, and the selecting official viewed Mr. Wardlow's qualifications as superior.

9. It further appears that the selecting official, Captain Richard Damico, did not consider affirmative action policies of the Navy in making his selection of Mr. Wardlow; but rather made his selection based entirely on merit considerations.

1Ø. From the evidence of record in the plaintiff's case, it appears undisputed that there was no evidence of any act or intent by the defendant or any of his officers or agents, to discriminate against the plaintiff or any applicant for the Rota CPD position, based upon his or her national origin, whether it be Hispanic or otherwise.

11. In summary, the Court finds from all the evidence presented in the

plaintiff's case, by a substantial preponderance of the evidence, that plaintiff has failed to present a prima facie case of discrimination in the process that led to his nonselection for the CPD position at Rota, Spain, in June of 1976.

THE "TRANSFER OF FUNCTION"

12. The second major personnel action that affected the plaintiff was the transfer of the personnel servicing function from NAS Miramar to NAS North Island,in the spring of 1977. This resulted in the abolishment of plaintiff's position as the Civilian Personnel Officer at Miramar (GS-12) and his temporary,then permanent, reassignment to North Island to a different (non-supervisory) position at the same GS-level.

13. The Court finds, with respect to this "transfer of function" issue,

that there was a demonstrated lack of ability in the Civilian Personnel Office at NAS Miramar to correct known and long-standing personnel program deficiencies that had been identified as far back as 1974 through 1976, and later. It is clear from the evidence educed in the plaintiff's case that there was a serious absence of skill aboard NAS Miramar in the personnel functions of position classification, as well as program management. The evidence indicated that position classification is a function which was under the direct responsibility of the plaintiff, as Civilian Personnel Officer (CPO), to administer and supervise. It is also clear from the record that from the time plaintiff assumed his duties as CPO at Miramar in September 1973, until he was transferred in the spring of 1977, there was little significant progress to correct the position

classification problems experienced at that command. Indeed, the evidence of record is substantial that in some respects the personnel problems at Miramar worsened after 1974, in the sense that the orderly performance of duty by the plaintiff's subordinates deteriorated, along with their morale. In part, this appears to be due to the lack of experience and depth in plaintiff's office, together with plaintiff's own problems of supervision. In particular, the Court finds that the plaintiff did little to correct improper classification problems that were repeatedly brought to his attention at NAS Miramar, and his inability or unwillingness to do so eventually was instrumental in the transfer of function, as well as his later non-selection to the job in Iwakuni, Japan.

14. While the Court finds evidence that personality problems arose between

the plaintiff and the NAS Miramar Commanding Officer, Captain Donald Pringle, the Court also finds from the evidence presented that these personality problems were caused by the personnel program problems already identified by the Court, and not vice versa. The Commanding Officer's frustration and impatience are not difficult to understand, where he perceived that personnel problems under his command responsibility were not being solved in an appropriate and timely manner. While the Court recognizes that personality problems existed which may have exacerbated the relationship between the plaintiff and Captain Pringle, it also finds that this was not the reason for the transfer of function. Nor did the C.O.'s impatience with the plaintiff invalidate the legitimate business decision to correct the deficiencies in the Miramar Civilian

Personnel Office by transferring the personnel servicing function to the admittedly superior, larger and more adequately staffed Industrial Relations Department at NAS North island.

15. In sum, it appears to the Court, by a substantial preponderance of the evidence, that the transfer of function was not motivated by discrimination, but rather was a legitimate business decision, made by the Commanding Officer and his chain of command, on the advice and consent and recommendation of the Western Field Division of the Office of Civilian Manpower Management (WFD/OCMM) after representatives of that office had inquired and made substantial study of the conditions at NAS Miramar.

16. The Court specifically finds that whatever reasons existed for Captain Pringle's impatience and frustration toward the plaintiff, there is no

evidence from which it can infer that he was motivated by mr. Torres' national origin, or the fact that the plaintiff may have previously filed one or more EEO complaints against the Navy. Despite all the evidence of disagreements, of frustrations and of impatience with regard to the functioning of the Miramar Civilian Personnel Office, it is impossible for this Court to detect any attempt by any Navy official involved in the transfer of function decision to discriminate or retaliate against the plaintiff, in violation of Title VII.

17. The Court further specifically finds that the circumstances surrounding the worsening of the conditions at NAS Miramar's Civilian Personnel Office would alone have been sufficient cause to motivate the Navy to transfer the personnel function to NAS North Island, regardless of the plaintiff's minority status, and

regardless of any pre-existing complaints of discrimination. From all of the evidence presented in the plaintiff's case, it appears that plaintiff's national origin had absolutely nothing to do with the breakdown of the relationship between plaintiff and his Commanding Officer that occurred in connection with the transfer of function.

THE TENTATIVE SELECTION TO THE CPD POSITION AT IWAKUNI

18. In the spring of 1977, it appears that the plaintiff was initially tentatively selected for the position of Civilian Personnel Director (CPD) at Marine Corps Air Station, Iwakuni, Japan. The selection process for CPD positions in the Marine Corps involved a preliminary selection by the local commanding officer, but this tentative selection had to obtain the approval of the Commandant of the Marine Corps, in

Washington, D.C., before it was final. Before the plaintiff's tentative selection could be acted upon by the Commandant, Mr. William Meaut, a Navy official, alerted Mr. Samuel Schulman, the top Marine Corps civilian personnel officer, about the personnel program audits that had been conducted at NAS Miramar by the Civil Service Commission (CSC) and the Western Field Division of the Navy's Office of Civilian Manpower Management (WFD/OCMM).

19. These aforementioned program audits of NAS Miramar by CSC and WFD/OCMM both revealed deficiencies in position classification, which Mr. Schulman considered to be quite significant in selecting a qualified applicant for the CPD job at Iwakuni. The announcement for the job itself had included the requirement that the selectee have a strong background in position classification.

20. The Court finds that there was no impropriety in Mr. Meaut's advising Mr. Schulman of the CSC and WFD/OCMM program audits that revealed deficiencies in the plaintiff's personnel program at NAS Miramar. Mr. meaut's information was correct information, and Mr. Schulman was not misled. Furthermore, it is apparent that this was important information for the marine Corps to know in making its selection for the CPD position at Iwakuni, Japan. Indeed, Mr. Meaut would have been subject to criticism had he not alerted Mr. Schulman as to the existence of this information.

21. The Court specifically finds that the withdrawal of the plaintiff's tentative selection to the Iwakuni position was based on the adverse information contained in the CSC and WFD/OCMM audits, and not on the plaintiff's national origin, or any motive for reprisal. The

Court would expect that whoever had been tentatively selected would have been withdrawn from consideration, if that kind of information had been furnished, regardless of the race, sex, creed or national origin of the tentative selectee. Accordingly, Mr. Schulman was credible when he testified by deposition that he made an independent decision to withdraw plaintiff from consideration, based solely on the audit reports of the WFD/OCCM and the CSC, and that he felt free to disregard Mr. meaut's initial information,had he not found it to have been substantiated by the reports.

THE REMOVAL FROM FEDERAL EMPLOYMENT

22. In January of 1980, the plaintiff was removed from his federal employment as a GS-12 Classification Specialist. Actually, the Court views this as an attempted removal, since the merit Systems Protection Board (MSPB)

eventually reinstated the plaintiff with all accrued back pay and allowances after he pursued his administrative appellate remedies before that body.

23. The Court makes no finding as to whether this attempted removal by the Navy was substantially a correct action to take. Nor does the Court make any finding as to whether the MSPB was correct in overturning that removal. Neither of those issues is properly before this Court.

24. The only issue before this Court is whether the plaintiff has presented sufficient evidence to prove that the attempted removal was motivated by discrimination or reprisal. The Court finds that he has not.

25. More specifically, the Court finds that the attempted removal was not the product of discrimination or reprisal against the plaintiff. Rather, the

evidence without contradiction demonstrates that the local command possessed ample reliable evidence of the plaintiff's alleged misconduct and unprofessional activities to support the decision to process Mr. Torres for removal. Ironically, this evidence included sworn allegations that the plaintiff had made unprofessional comments on the subjects of race and national origin, among other things, and that he had tried to intimidate his co-employees concerning matters related to plaintiff's EEO complaints or his Title VII suit. It is conceded that if those allegations were true, that the kind of conduct described would be the kind of conduct that would merit removal.

THE VARIOUS SHORT-FORM REPRISAL COMPLAINTS

26. In addition to the four major EEO complaints that plaintiff filed

concerning the four discrete personnel actions that have been discussed above, the plaintiff filed several additional "short-form" (or "262(b)") complaints with the Navy, primarily concerning the manner in which the plaintiff's "long" complaints were being processed. These several "short-form" complaints were offered, along with allegations of a second rejection for the Rota, Spain, CPD position in 1977, as evidence of retaliation and reprisal by the defendant.

27. While the Court notes that the Navy failed to deal in an appropriate way with the repeated "short-form" complaints generated by the plaintiff, and that the so-called "long" complaints generally took longer than the recommended time periods to be resolved, these procedural problems do not appear to have had any direct relationship to the personnel actions that are complained about in the

various "long" complaints. In the case of each of these major personnel actions, the Court finds by a substantial preponderance of the evidence that the action taken by navy officials was supported by valid, sufficient, understandable and logical business reasons all of which was shown by plaintiff's case in chief. And despite a substantial effort on the part of the Court to find evidence that the plaintiff was the victim of discrimination or reprisal, there is simply nothing probative offered by the plaintiff upon which to base a finding that the Navy discriminated against the plaintiff.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction over these consolidated actions,under 28 U.S.C. S 1331 and 42 U.S.C. S 2000e-16(c).

2. As a federal employee, plaintiff's exclusive remedy for alleged

national origin discrimination against him lies under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C S 200e-16. Brown v. G.S.A., 425 U.S. 820 (1976). The same is true with respect to allegations of reprisal that arise out of plaintiff's exercise of his rights under Title VII. White v. General Services Administration, 652 F.2d 913 (9th Cir. 1981).

3. In a disparate treatment case, the plaintiff merely has the initial burden of establishing a prima facie case by a preponderance of the evidence, and in doing so he must identify some discriminatory criterion "as the likely reason for the denial of a job opportunity." Cassillas v. Secretary of the Navy, 735 F.2d 338, 3443 (9th Cr. 1984). If the plaintiff establishes such a prima facie case, the defendant employer must then present evidence that the employment

or promotion action was taken for a legitimate, non-discriminatory reason. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478, 1481 (1983). The employer need not present clear and convincing evidence of non-discrimination. Felton v. Trustees of the California State Universities and Colleges, 708 F.2d 1507, 1508 (9th Cir. 1983). Once the employer has presented admissible evidence showing its legitimate business reasons, any prima facie presumptions "drop from the case" and the court may then decide the ultimate factual issue of whether the employer's action was grounded upon impermissible discrimination. Casillas v. Secretary of the Navy, 735 F.2d at 343. In the context, plaintiff may rebut the defense by showing pretext. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

4. Utilizing the foregoing principles for evaluating the evidence presented in the plaintiff's case in chief, this Court has found that the plaintiff has failed to carry his initial prima facie burden of showing that some discriminatory criterion was the likely reason for the denial of a job opportunity. The plaintiff was given ample opportunity to demonstrate that the Navy's actions constituted discriminatory conduct, but nevertheless failed to do so as to many of the personnel actions that affected him. Indeed, the plaintiff's presentation established the non-pretextual legitimate business reasons for the actions which were taken by the defendant.

5. The court also gave plaintiff ample opportunity to establish a "disparate impact" case, despite the fact that he had never sought certification of

his suit as a class action. Statistical evidence of disparate impact may be circumstantially relevant in a disparate treatment case as well. Gay v. Waiters' & Dairymen's Union Local No. 30, 694 F.2d 531 (9th Cir. 1982). However, plaintiff failed to produce any probative evidence of disparate impact that would justify giving serious consideration to this theory. See, Moore v. Hughes Helicopters Inc., 708 F.2d 475, 481-82 (9th Cir. 1983). In fact, the only "facially" neutral employment practice that could be said to be involved in this case,namely, the rating and ranking process for civilian personnel directors in the Navy, arguably had no adverse impact on the plaintiff at all, since he emerged from that process as one of six "best qualified" for selection, and the numerical score he received was not controlling in the ultimate selection

decision.

6. Nor, as a matter of law, were plaintiff's attempts to present statistical evidence of any help to his case. While the Court admitted plaintiff's offer of statistical evidence, using the most liberal criterion of admissibility, plaintiff ultimately failed to relate these statistics to any part of his case. The statistics offered were rendered virtually worthless, since they were admittedly inaccurate and since no meaningful effort had been made by plaintiff's purported expert to adjust them demographically. Accordingly, this Court could not properly accord plaintiff's statistical evidence any probative value as evidence of discriminatory animus. Casillas v. Secretary of the Navy, 735 F.2d at 345. See, White v. City of San Diego, 605 F.2d 455, 460 (9th Cir. 1979). Further, insofar as

the plaintiff offered statistics to prove that his nonselection to a particular supervisory position was discriminatory, they were practically valueless, since they constituted comparisons to the general population, and failed to "properly characterize the labor pool available for the job at issue," Casillas, 735 F.2d at 345-46, and failed to consider the special qualifications necessary to fill civilian personnel direct positions. See, Piva v. Xerox Corp., 654 F.2d 591, 596 (9th Cir. 1981); Gay v. Waiters' and Dairy Lunchmen's Union Local No. 30, 694 F.2d 531, 552-53 (9th Cir. 1982); Moore v. Hughes Helicopters, Inc., 708 F.2d at 482-83.

7. Similarly, plaintiff's allegation that the Navy failed to implement its affirmative action policies, so as to insure his selection to the Rota, Spain, CPD position, is evidence only of plain-

tiff's misunderstanding of the requirements of Title VII. Title VII does require that all federal employees be afforded equal opportunity in all personnel actions that affect them. 42 U.S.C. S 200e-16(a). It does not require that preferential treatment be afforded to any employee based upon his or her minority status, even though such action may be permitted under a policy of affirmative action, under certain limited circumstances. See, Steelworkers v. Weber, 443 U.S. 193 205-06 91979); Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984). An alleged violation of a race-conscious affirmative action program does not constitute a per se violation of Title VII. Page v. Bolger, 645 F.2d 227, 232-34 and n. 10 (4th Cir. 1981(en banc), cert. denied, 454 U.S. 892 (1981). Title VII does not require an employer to

restructure his or her employment practices to maximize the number of minorities hired or advanced. Furnco Construction Co. v. Waters, 438 U.S. 567, 577-78 (1978).

8. With respect to plaintiff's various charges of reprisal, this Court has found that no probative evidence has been presented to establish that the challenged personnel actions were motivated by a desire to discriminate or retaliate. In other words, plaintiff has failed to demonstrate that the actions taken adverse to his interests can be causally linked to his filing of prior EEO complaints. More must be shown than the mere fact that an adverse personnel action occurred subsequent in time to plaintiff's filing of an EEO complaint. See, Williams v. Boorstin, 663 F.2d 109, 114-15 (D.C. Cir. 1980), Cert. denied, 451 U.S. 985 (1981); Wrighten v. Metro-

politan Hospitals, Inc., 726 F.2d 1346, 1354 (9th Cir. 1984).

9. Nor is the plaintiff's reinstatement by the MSPB after his removal legally dispositive of the issues before this Court, which must decide de novo whether that attempted removal was motivated by discrimination or reprisal. As noted above, the Court has found that the initiation of the process to remove the plaintiff was based upon ample reliable evidence of the plaintiff's alleged misconduct and unprofessional activities. Even assuming that the Navy officials who proposed the removal action were honestly mistaken in their belief that this misconduct had taken place, this would not constitute unlawful discrimination or reprisal under Title VII. Corley v. Jackson Police Department, 566 F.2d 994, 1003 n. 14 (5th Cir. 1978); cf. Clark v. Huntsville City Board of Education, 717

F.2d 525, 528 (11 Cir. 1983) (mistaken belief that selectee's qualifications superior to the plaintiff's).

10. In the instant case, plaintiff has failed to carry his burden of persuading the finder of fact that the defendant, his officers or agents, intentionally discriminated against plaintiff because of his national origin with respect to any of the alleged incidents of discrimination.

11. Nor has plaintiff met his burden of demonstrating that the defendant took adverse action against him because of the fact that plaintiff had previously engaged in activities protected by Title VII.

12. In view of all of the foregoing, the defendant Secretary of the Navy is entitled to dismissal of plaintiff's consolidated actions and all of the causes of action included therein,

pursuant to his motion to dismiss, under Rule 41(b) of the Federal Rules of Civil Procedure. This shall be deemed a ruling on the merits of the case, since the Court has endeavored to weigh the evidence and resolve any conflicts presented thereby. Wilson v. United States, 645 F.2d 728, 730 (9th Cir. 1981).

13. The foregoing shall constitute the findings of fact and conclusions of law required by Rule 52(a), Fed. R. Civ. P. Those findings of fact that should more properly constitute conclusions of law shall be deemed conclusions of law, and those conclusions of law that should more properly constitute findings of fact shall be deemed findings of fact.

In view of all of the foregoing, and good cause appearing therefore,

IT IS HEREBY ORDERED AND ADJUDGED that the defendant's motion to dismiss at

the close of plaintiff's case, brought under Rule 41(b), Fed. R. Civ. P., shall be and the same is GRANTED. Judgment may be entered accordingly in favor of the defendant, together with costs of suit.

DATED: November 16, 1984

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND R. TORRES, Plaintiff,)
)
vs.)
)
SECRETARY OF THE NAVY, Defendant)
)

Civil Nos. 78-0256-B(I)
82-0294-B(I)

JUDGMENT FOR COSTS

Plaintiff's motion to disallow costs came on for hearing on January 4, 1985, before the Honorable Rudi M. brewster, United States District Judge, attorney Sergio Luis Lopez, Esquire, appearing specially on behalf of plaintiff Raymond R. Torres, and Assistant United States Attorney D. Michael Waltz, appearing on behalf of the defendant Secretary of the Navy. Having heard and considered the arguments of counsel, both oral and written, and being well advised in the premises, and good cause appearing

therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Court, having entered judgment for defendant on December 11, 1984, providing that costs be awarded to the defendant, the Court now finds that costs should be awarded to the defendant and against the plaintiff in the amount of $14,344.12; and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's motion to disallow costs shall be denied.

DATED: Jan. 24, 1985

RUDI M. BREWSTER
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

PETER K. NUNZ
United States Attorney

STEPHEN V. PETIX
Assistant U.S. Attorney
Attorneys for Defendant

APPROVED AS TO FORM (upon oral reading to counsel)

by: SERGIO LUIS LOPEZ
Attorney for Plaintiff
(Appearing Specially)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND R. TORRES, Plaintiff-Appellant,)
)
vs.)
)
SECRETARY OF THE NAVY, Defendant-Appellee)
)

CA No. 84-6537
DC No. CV-78-Ø256-B(I)

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Honorable R.M. Brewster,
District Judge, Presiding
Argued and Submitted November 5, 1986
Pasadena, California

Before: BROWNING, Chief Judge, GOODWIN and FARRIS, Circuit judges.

Raymond R. Torres, of Spanish-Mexican-American descent, appeals from judgment entered in his Title VII action, which centered on four separate employment actions by the Navy. His complaint alleged that the actions were

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cr. R. 21.

resolved adversely to him as a result of racial discrimination or in retaliation for his persistent charges of discrimination in administrative and judicial proceedings.

We have carefully reviewed the extensive record in this matter. After hearing twenty-one days of testimony in the plaintiff's cases, which followed extensive discovery, the trial court entered findings of fact and conclusions of law and granted judgment for the defendant.

We recognize that the court's findings differ from those Torres believes the evidence dictates, but we review factual findings for clear error. The record reflects a careful and detailed review of Torres' allegations and evidence. It supports the findings. We cannot review evidence as to its weight or credibility. Palmer Coking

Coal Co. v. Director, Office of Workers' Compensation Programs, 720 F.2d 1054, 1058 (9th Cir. 1983); Thomas v. Andrus, 552 F.2d 871, 872 (9th Cir. 1977) (per curiam). Findings of fact will be overturned only if they are clearly erroneous. Bohemia, Inc. v. Home Insurance Co., 725 F.2d 506, 508-09 (9th Cir. 1984).

WE have also reviewed the record to determine whether, as Torres argues, the trial court failed to consider the retaliation aspect of his claim. With this argument, Torres indicates his misunderstanding of the issues. The court found no racial discrimination. Torres understands this, even though he disagrees with the finding. He argues, however, that if the actions of which he complains were not the result of discrimination, they were done to retaliate against him for making persistent charges

of discrimination. This argument, he alleges, was not addressed by the trial court. However, the trial court found no evidence of racial motivation for any actions taken by the Navy and no "causal link" between those actions and Torres' discrimination complaints. There is substantial evidence in the record to support this finding. Our careful review satisfies us that the trial court resolved each factual dispute and applied proper legal standards in reaching its decision.

Torres argues that no costs should have been allowed against him since costs should only be awarded to a defendant in a Title VII case when the suit is frivolous. He relies upon Lewis v. NLRB, 750 F.2d 1266 (5th Cir. 1985). He misunderstands the holding of Lewis. The award of costs by a trial court is within the court's discretion under Title VII.

We review for abuse of discretion. Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1357-58 (9th Cir. 1984); Moore v. Hughes Helicoptesr,Inc., 708 F.2d 475, 486 (9th Cir. 1983). We find no abuse of discretion.

AFFIRMED.

(Filed November 24, 1986)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCULT

RAYMOND R. TORRES, Plaintiff-Appellant,

v.

SECRETARY OF THE NAVY, Defendant-Appellee

CA No. 84-6537

DC No. CV-78-Ø256-B(I)
Southern District of California

ORDER

BEFORE: BROWNING, Chief Judge, GOODWIN and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

(Filed January 14, 1987)

CERTIFICATE OF FILING

I, Raymond R. Torres, Petitioner, hereby certify that on February 20, 1987, the original Petition for Writ of Certiorari was deposited with the United States Post Office, and the mailing of said Petition took place within the time permitted by the rules of the Supreme Court of the United States. A copy of said Petition was served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, and upon Stephen v. Petix, Esq., Assistant U.S. Attorney, 940 Front Street, Room 5-N-19, San Diego, CA 92189, at the same time and place as stated above.

Executed this 20th day of February 1987, at 10910 Glencreek Circle, CA 92131.

Raymond R. Torres

RAYMOND R. TORRES, Petitioner